

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARCIA L. COLE-ARMENTINO,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 2:13-CV-0314-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 18, 19. Attorney Joseph Linehan represents Marcia L. Cole-Armentino (Plaintiff); Special Assistant United States Attorney Jeffrey Eric Staples represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits on December 28, 2009, and Supplemental Security Income (SSI) on February 5, 2010, alleging disability since November 18, 2009, due to "Type 2 diabetes/vision problems/back, legs and feet/thyroid/depression." Tr. 202-203, 209-213, 223. The applications were denied initially and upon reconsideration. Administrative Law Judge (ALJ) Marie Palachuk held hearings on June 7, 2011, and October 25, 2011, Tr. 35-88, and issued an unfavorable decision on November 17, 2011, Tr. 14-27. The

1 Appeals Council denied review on June 28, 2013. Tr. 1-5. The ALJ's November
2 2011 decision became the final decision of the Commissioner, which is appealable
3 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for
4 judicial review on August 26, 2013. ECF No. 1, 5.

5 **STATEMENT OF FACTS**

6 The facts of the case are set forth in the administrative hearing transcript, the
7 ALJ's decision, and the briefs of the parties. They are only briefly summarized
8 here.

9 Plaintiff was born on November 20, 1961, and was 47 years old on the
10 alleged onset date, November 18, 2009. Tr. 48, 234. Plaintiff went to school
11 through the ninth grade and stopped attending school due to a pregnancy and the
12 premature birth of her first child. Tr. 50. She testified at the administrative
13 hearing she has not obtained her GED but has obtained a certificate to be a nurse
14 assistant registered. Tr. 50. Plaintiff had four children, two of whom are deceased.
15 Tr. 48-49. Her two children work and reside in Spokane. Tr. 49. Plaintiff
16 indicated she last worked as a nurse's aide/caregiver. Tr. 51, 59. Prior to working
17 as a caregiver, she worked six years as a janitor at Fairchild Air Force Base. Tr.
18 59-60, 81. She also worked approximately 18 years managing a carnival with her
19 husband. Tr. 60, 82.

20 Plaintiff testified regarding physical and emotional abuse from her first
21 husband, Tr. 53-54, problems associated with a subsequent spouse, Tr. 52-53, and
22 emotional trauma from the deaths of her mother and two sons, Tr. 48-49. She
23 described difficulties with sleep at night, including flashbacks, waking two to three
24 times a night, and waking with sweats, Tr. 53-54, and stated she often has panic
25 attacks at night which last about an hour or more, Tr. 57. She indicated she is
26 sometimes lucky to get four hours of sleep at night, while on other occasions she is
27 able to sleep through the night. Tr. 53-54. She testified she has trouble
28 concentrating, has problems with feeling overwhelmed, and does not like to be

1 around a lot of people. Tr. 54-55. Plaintiff stated the counseling she had been
2 attending for the seven months prior to the administrative hearing had been helpful.
3 Tr. 54.

4 Plaintiff also described pain she experiences in her lower back, from her
5 tailbone down through her legs. Tr. 56, 59. She indicated the pain and neuropathy
6 were always present and she had been receiving injections for these issues. Tr. 56.
7 Plaintiff stated she also has difficulty with reaching with her upper extremities and
8 is only able to comfortably lift and carry five to 10 pounds. Tr. 58-59.

9 Plaintiff testified she was able to take care of her own personal needs on a
10 daily basis and was able to help out around the house, including doing some
11 dusting and laundry. Tr. 57. She reported she also took care of a small dog and
12 was able to use public transportation to visit her grandchildren on the other side of
13 town. Tr. 57-58. When asked about alcohol and drugs, Plaintiff stated she does
14 not drink, had tried methamphetamine on one occasion, and previously had a
15 medical marijuana license but no longer used marijuana because she found it did
16 not help her pain. Tr. 55.

17 STANDARD OF REVIEW

18 The ALJ is responsible for determining credibility, resolving conflicts in
19 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
20 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,
21 although deference is owed to a reasonable construction of the applicable statutes.
22 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ
23 may be reversed only if it is not supported by substantial evidence or if it is based
24 on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
25 evidence is defined as being more than a mere scintilla, but less than a
26 preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant
27 evidence as a reasonable mind might accept as adequate to support a conclusion.
28 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to

1 more than one rational interpretation, the court may not substitute its judgment for
 2 that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec.*
 3 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). Nevertheless, a decision supported by
 4 substantial evidence will still be set aside if the proper legal standards were not
 5 applied in weighing the evidence and making the decision. *Browner v. Secretary*
 6 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial
 7 evidence exists to support the administrative findings, or if conflicting evidence
 8 exists that will support a finding of either disability or non-disability, the ALJ's
 9 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th
 10 Cir. 1987).

11 **SEQUENTIAL EVALUATION PROCESS**

12 The Commissioner has established a five-step sequential evaluation process
 13 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 14 416.920(a); *see, Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
 15 through four, the burden of proof rests upon the claimant to establish a prima facie
 16 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
 17 burden is met once a claimant establishes that a physical or mental impairment
 18 prevents him from engaging in his previous occupation. 20 C.F.R. §§
 19 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the
 20 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
 21 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist
 22 in the national economy which claimant can perform. *Batson v. Commissioner of*
 23 *Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make
 24 an adjustment to other work in the national economy, a finding of "disabled" is
 25 made. 20 C.F.R. §§ 404.1520(a)(4)(i-v), 416.920(a)(4)(i-v).

26 **ADMINISTRATIVE DECISION**

27 The ALJ found that Plaintiff had not engaged in substantial gainful activity
 28 since November 18, 2009, the alleged onset date. Tr. 16. At step two, the ALJ

1 determined that Plaintiff had the following severe impairments: spondylosis of the
2 thoracic, lumbar and cervical spine; spondylolisthesis of the lumbar spine; diabetes
3 mellitus; chronic pain syndrome; undifferentiated somatoform disorder; major
4 depressive disorder; opiate/substance abuse; and personality disorder, not
5 otherwise specified. Tr. 17. At step three, the ALJ found Plaintiff's impairments,
6 alone and in combination, did not meet or medically equal one of the listed
7 impairments. Tr. 18.

8 The ALJ assessed Plaintiff's RFC and determined she could perform less
9 than a full range of light exertion level work. Tr. 19. The ALJ determined
10 Plaintiff had the following limitations: she can frequently lift and/or carry ten
11 pounds and occasionally lift and/or carry 20 pounds; she can sit, stand and walk six
12 hours out of an eight-hour workday; all posturals can be performed frequently,
13 except she can only climb ladders, ropes or scaffolds occasionally; she can
14 understand, remember and carry out simple, routine, repetitive instructions and
15 tasks; she is able to make simple, work related decisions, ask for help and ask
16 questions, as needed; and she can maintain attention and concentration for two-
17 hour intervals, generally required between regularly scheduled breaks. Tr. 19.

18 At step four, the ALJ found Plaintiff was able to perform her past relevant
19 work as a cleaner, housekeeper. Tr. 26. The ALJ thus determined Plaintiff was
20 not under a disability within the meaning of the Social Security Act at any time
21 from November 18, 2009, the alleged onset date, through the date of the ALJ's
22 decision, November 17, 2011. Tr. 27.

23 ISSUES

24 The question presented is whether substantial evidence exists to support the
25 ALJ's decision denying benefits and, if so, whether that decision is based on
26 proper legal standards.

27 Plaintiff contends the ALJ erred because she is more limited from a
28 psychological standpoint than what was determined by the ALJ in this case. ECF

No. 18 at 13. Plaintiff specifically argues the ALJ failed to properly consider the opinions of examining medical sources John Arnold, Ph.D., and W. Scott Mabee, Ph.D., regarding her psychological limitations. ECF No. 18 at 13-16. Plaintiff additionally asserts the ALJ erred by providing improper rationale to reject Plaintiff's testimony regarding her symptoms. ECF No. 18 at 16-18.

DISCUSSION

A. Plaintiff's Credibility

Plaintiff argues the ALJ erred by failing to properly consider or reject her symptom testimony. ECF No. 18 at 16-18.

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying medical impairment, the ALJ may not discredit testimony as to the severity of an impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

In this case, the ALJ found Plaintiff's medically determinable impairments could reasonably be expected to cause some of the alleged symptoms; however, Plaintiff's statements concerning the intensity, persistence and limiting effects of the symptoms were not credible to the extent they were inconsistent with the ALJ's RFC assessment. Tr. 20.

As indicated by the ALJ, the medical evidence of record does not support Plaintiff's subjective complaints. Tr. 20. A lack of supporting objective medical

1 evidence is a factor which may be considered in evaluating a claimant's credibility,
2 provided it is not the sole factor. *Bunnell v. Sullivan*, 347 F.2d 341, 345 (9th Cir.
3 1991). The ALJ noted an October 2005 lumber spine MRI, Tr. 476, November
4 2005 EMG nerve conduction testing, Tr. 477, a 2009 neurological examination, Tr.
5 521-528, 2007 imaging of the lumbar spine, Tr. 583, and January 2011 thoracic
6 spine imagining, Tr. 958, did not support Plaintiff's complaints of disabling back
7 pain. Tr. 20. Moreover, the ALJ noted that despite complaints of disabling mental
8 impairments, Plaintiff reported no history of psychotherapy or psychiatric
9 hospitalizations as of 2007 and no active counseling as of 2009. Tr. 20. It was
10 appropriate for the ALJ to conclude that the objective medical evidence did not
11 support allegations of disability by Plaintiff.

12 The ALJ indicated Plaintiff also expressed improvement of her mental
13 health symptoms with psychiatric medication. Tr. 20. An ALJ may rely on the
14 effectiveness of treatment to find a plaintiff's testimony unpersuasive. 20 C.F.R. §
15 416.929(c)(3) (the effectiveness of medication in alleviating pain and other
16 symptoms is a relevant factor to consider in evaluating the severity of a claimant's
17 symptoms), *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 600 (9th Cir.
18 1999) (an ALJ may properly rely on a report that a plaintiff's mental symptoms
19 improved with the use of medication); *Odle v. Heckler*, 707 F.2d 439, 440 (9th Cir.
20 1983) (impairments controlled by treatment cannot be considered disabling). In
21 August 2007, an examining medical professional reported Plaintiff's depression
22 was "well controlled" with medication. Tr. 485-486. It was proper for the ALJ to
23 rely on Plaintiff's indication of improvement of symptoms as a basis to find her
24 less than fully credible in this case.

25 The ALJ further noted the record revealed Plaintiff had worked with her
26 allegedly disabling conditions. Tr. 20-21. The ability to work can be considered in
27 assessing credibility. *Bray v. Comm'r Social Security Admin.*, 554 F.3d 1219,
28 1227 (9th Cir. 2009) (finding the ALJ properly discounted a plaintiff's testimony

1 because she recently worked as a personal caregiver for two years and had since
2 sought out other employment). While Plaintiff claimed a disability onset date of
3 November 18, 2009, the record reflects an independent medical evaluation had
4 cleared her to return to work no later than January 2010, and Plaintiff had been
5 terminated from a job in January 2010. Tr. 743, 750. The ALJ indicated the fact
6 that Plaintiff's impairments did not prevent her from working and that she ceased
7 working for reasons unrelated to her impairments suggested her impairments were
8 not as limiting as alleged. Tr. 20-21.

9 The ALJ next indicated the record reflected Plaintiff had compliance/effort
10 issues. Tr. 21. A lack of cooperation during an examination or a display of "poor
11 effort" by a claimant may be used to illustrate a claimant's tendency to exaggerate.
12 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). The ALJ noted
13 medical reports showed Plaintiff "self-limited most activities," she "did not
14 cooperate with scheduling for testing," and she had "inconsistent performance."
15 Tr. 21, 490-491. The fact that Plaintiff displayed cooperation/effort problems
16 discounts her claim of disabling symptoms.

17 The ALJ additionally mentioned Plaintiff's history of substance abuse. Tr.
18 21. An ALJ may properly consider evidence of a claimant's drug use and drug-
19 seeking behavior in assessing credibility. *Edlund v. Massanari*, 253 F.3d 1152,
20 1157 (9th Cir. 2001). As noted by the ALJ, despite a positive drug screen for
21 marijuana, Plaintiff did not admit to regular use of the drug in January 2010. Tr.
22 21, 758. In December 2010, she reported she only used marijuana when it was
23 provided by a neighbor. Tr. 946. On February 17, 2010, Plaintiff called her
24 provider requesting an early refill of hydrocodone and lorazepam. Tr. 21, 837. On
25 February 25, 2010, Plaintiff presented to the emergency room and tested positive
26 for methamphetamine and opiates. Tr. 829. The emergency department provider
27 confronted Plaintiff about her drug abuse and explained to her that
28 methamphetamine/opiate use was multiplying her problems. Tr. 829. In 2011,

1 Plaintiff's provider reported Plaintiff had been to the emergency room over 10
2 times in the last six to eight months for pain management, on each occasion
3 requesting pain medication. Tr. 954. The provider stated he had concerns about
4 drug seeking behavior, as Plaintiff's concerns and complaints did not correspond to
5 her actions in the examination room. Tr. 21, 954. In May 2011, Plaintiff violated
6 her pain contract due to a positive drug test. Tr. 21, 1073. In August 2011,
7 Plaintiff experienced acute opiate withdrawal. Tr. 21, 1146-1147. Plaintiff
8 described the episode as a "drug induced coma." Tr. 1146. At the hospital
9 following the incident, Plaintiff's boyfriend indicated Plaintiff had in the past used
10 cocaine, amphetamines and methamphetamines. Tr. 21, 1113. Based on the
11 foregoing, it was appropriate for the ALJ to find Plaintiff's ongoing drug use and
12 drug seeking behavior reduced her credibility. Tr. 21.

13 The ALJ noted that secondary gain issues may also be present in this case.
14 Tr. 21. "Secondary gain" refers to a significant psychological motivation that a
15 patient may have for reporting symptoms. *Townsend v. Astrue*, 2013 WL 687042
16 (D. Or. 2013). The ALJ may consider the issue of secondary gain in rejecting
17 symptom testimony. *Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1998); *Gaddis v.*
18 *Chater*, 76 F.3d 893, 896 (8th Cir. 1996) (allowing an ALJ to judge credibility
19 based on a strong element of secondary gain). The ALJ indicated the record
20 reflects Plaintiff was "focused" on the need for Social Security disability income,
21 Tr. 758, and had expressed concern her monthly DSHS payments were being
22 reduced and felt "down" about not providing for her family during Christmas, Tr.
23 911. Tr. 21. The ALJ also mentioned the opinion of George R. Harper, M.D., that
24 Plaintiff "has a very high disability conviction." Tr. 23, 481. It was appropriate
25 for the ALJ to consider evidence regarding Plaintiff's possible motivation for
26 secondary gain in assessing her credibility in this case.

27 Lastly, the ALJ held that Plaintiff's ability to "perform a full range of daily
28 activities" was inconsistent with the nature, severity and subjective complaints of

1 Plaintiff. Tr. 21. It is well-established that the nature of daily activities may be
2 considered when evaluating credibility. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
3 1989). The ALJ indicated that Plaintiff was able to babysit, go to the casino, go to
4 movies, tend to her roses, walk up to a quarter mile, travel to Montana to visit
5 relatives, cycle up to four times a week, use a treadmill and weights, ride public
6 transportation, grocery shop, and feed/walk her dog. Tr. 21. This level of activity
7 is not consistent with Plaintiff's claim of disability.

8 The ALJ is responsible for reviewing the evidence and resolving conflicts or
9 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
10 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in
11 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in
12 determining whether the ALJ's decision is supported by substantial evidence and
13 may not substitute its own judgment for that of the ALJ even if it might justifiably
14 have reached a different result upon de novo review. 42 U.S.C. § 405(g). After
15 reviewing the record, the Court finds the ALJ provided ample clear and convincing
16 reasons that are fully supported by the evidence of record for discounting
17 Plaintiff's subjective complaints. Accordingly, the ALJ did not err by concluding
18 Plaintiff's subjective complaints regarding the extent of her symptoms and
19 limitations were not entirely credible in this case.

20 **B. Medical Source Opinions**

21 Plaintiff contends the ALJ also erred by failing to accord proper weight to
22 the opinions of examining medical sources regarding her psychological limitations.
23 ECF No. 18 at 13-16. Plaintiff argues the opinions expressed by John Arnold,
24 Ph.D., and W. Scott Mabey, Ph.D., demonstrate she is more limited from a
25 psychological standpoint than what was determined by the ALJ in this case. ECF
26 No. 18 at 13-16.

27 The ALJ concluded the objective medical evidence did not support the level
28 of mental limitation alleged by Plaintiff. The ALJ found that although Plaintiff has

1 mild restrictions in activities of daily living, mild difficulties in social functioning
2 and moderate difficulties in concentration, persistence and pace, Plaintiff retained
3 the RFC to understand, remember and carry out simple, routine, repetitive
4 instructions and tasks, is able to make simple, work related decisions, ask for help
5 and ask questions, as needed, and can maintain attention and concentration for two
6 hour intervals, generally required between regularly scheduled breaks. Tr. 18-19.
7 The Court finds the ALJ's interpretation of the medical record is supported by
8 substantial evidence. *See infra*.

9 **1. Medical Opinions Prior to the Alleged Onset Date**

10 Plaintiff alleges disability since November 18, 2009. In support of her
11 determination regarding Plaintiff's RFC, the ALJ cites several medical reports that
12 predate Plaintiff's alleged onset date. *Fair v. Bowen*, 885 F.2d 597, 600 (9th Cir.
13 1989) (medical opinions that predate the alleged onset of disability are of limited
14 relevance). Although evidence from the period of time prior to the alleged onset
15 date does not address claimant's medical status during the relevant period at issue
16 in this case, it can be deemed useful as relevant background information.

17 As noted by the ALJ, George R. Harper, M.D., an orthopedic surgeon,
18 completed a physical evaluation of Plaintiff on May 9, 2007. Tr. 23, 475-482. Dr.
19 Harper opined that Plaintiff had a "very high disability conviction," and reported
20 he found "nothing in her history, chart review, or her examination today to suggest
21 that she had an objective reason why she cannot return to work." Tr. 481.

22 The ALJ also noted Mark Holmes, M.D., a neurologist, and Peter Taylor,
23 M.D., an orthopedic surgeon, completed a physical assessment of Plaintiff on June
24 17, 2008. Tr. 23, 500-512. These physicians concluded "no objective findings are
25 present that would preclude [Plaintiff] from employment on a reasonably
26 continuous basis." Tr. 23, 511.

27 The ALJ further reported a psychiatric evaluation was completed by John
28 Kooiker, M.D., on June 17, 2008. Tr. 23, 513-517. Dr. Kooiker indicated there

1 was no clear-cut evidence of depression, but a “good deal” of evidence of anxiety
2 and resentment associated with the stresses connected to her mother’s death and
3 subsequent family tensions regarding the estate settlement. Tr. 23, 516. Dr.
4 Kooiker opined there was no clear evidence linking Plaintiff’s pain complaints to
5 her work injury and that her complaints seemed to be related to conflict with her
6 siblings about settling the estate. Tr. 23, 517. No treatment was recommended.
7 Tr. 23, 517.

8 The ALJ next noted James R. Kopp, M.D., an orthopedic surgeon, and Tariq
9 Doorani, M.D., a neurologist, completed a physical assessment of Plaintiff on
10 March 20, 2009. Tr. 23, 521-528. Plaintiff displayed significant pain behavior on
11 her physical examination, with a positive Waddell sign and a positive cogwheeling
12 give-way. Tr. 527. The report explains “Waddell signs were designed . . . to be
13 simulation, not stimulation. In other words, they do not stimulate the spine and
14 they should be negative, even in a person who is pending surgery, but they are
15 perceived by a patient to be something that should ‘stimulate’ the spine and so they
16 are positive and they should not be.” Tr. 527. “Cogwheeling giving-way is a
17 conscious effort on the part of a claimant to fabricate a weakness that is not there.”
18 Tr. 527. Again, Plaintiff’s Waddell signs and cogwheeling give-way were positive
19 on exam. Tr. 527.

20 The ALJ found the foregoing medical evidence was entitled to weight
21 because it showed Plaintiff has continuously overstated her pain complaints when
22 compared to objective findings. Tr. 24. The ALJ concluded the above
23 unremarkable psychological and physical testing did not indicate barriers to work,
24 which is consistent with the record as a whole. Tr. 24.

25 **2. Dr. Schmidt, December 2009 Evaluation**

26 On December 31, 2009, Daniel R. Schmidt, D.O., completed a Washington
27 Department of Labor and Industries claim form limiting Plaintiff to a modified
28 duty work level for approximately one year. Tr. 24, 652. The ALJ appropriately

1 accorded some weight to Dr. Schmidt's opinion which demonstrated Plaintiff was
2 capable of performing at least a modified work schedule for a limited period,
3 which suggested Plaintiff's limitations were temporary and allowed her to return to
4 full-time work. Tr. 24.

5 **3. Ms. Hammond, January 13, 2010 Evaluation**

6 On January 13, 2010, Kimberlee Hammond, P.T., completed a physical
7 therapy functional capacity evaluation of Plaintiff. Tr. 24, 667-669. It was noted
8 Plaintiff gave variable levels of physical effort during the examination. Tr. 24,
9 667. Ms. Hammond nevertheless opined Plaintiff was capable of performing the
10 physical demands of her pre-injury job of caring for residents that did not require
11 medium exertion lifting. Tr. 668. It was recommended Plaintiff be returned to a
12 position of work in her occupation that required very little lifting. Tr. 669. The
13 ALJ accorded the report significant weight because the limit of light exertion level
14 work was consistent with the evidence of record. Tr. 24.

15 **4. Dr. Arnold, March 10 Evaluation**

16 On March 16, 2010, John Arnold, Ph.D., completed a check-box
17 Psychological/Psychiatric Evaluation form following a consultative examination of
18 Plaintiff. Tr. 850-855. Dr. Arnold checked boxes indicating Plaintiff had marked
19 limitations in her abilities to exercise judgment and make decisions, relate
20 appropriately to co-workers and supervisors, respond appropriately to and tolerate
21 the pressures and expectations of a normal work setting, and maintain appropriate
22 behavior in a work setting. Tr. 853. However, as noted by the ALJ, the narrative
23 portion of Dr. Arnold's report indicates Plaintiff was able to remember locations
24 and simple work like procedures, understand, remember and carry out simple
25 verbal and written instructions, ask simple questions and request assistance, accept
26 instructions and be aware of normal hazards and take appropriate precautions. Tr.
27 24, 853. The ALJ also mentioned Dr. Arnold commented about Plaintiff's
28 exaggeration of symptoms. Tr. 24. Dr. Arnold noted Plaintiff's profile seemed

1 “questionably valid” since there were indications Plaintiff intended to portray
2 herself in a consistently negative or pathological manner. Tr. 24, 855. Dr. Arnold
3 wrote Plaintiff “**reports** a number of difficulties consistent with significant
4 depressive experience.” Tr. 855 (emphasis added).

5 The ALJ appropriately accorded Dr. Arnold’s findings of marked limitations
6 little weight. Tr. 24. The ALJ noted a lack of objective evidence supporting the
7 check-box findings. Tr. 24. It is permissible for an ALJ to reject a check-box
8 report that does not contain an explanation of the bases for the conclusions made
9 therein. *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996). The ALJ also
10 indicated Dr. Arnold’s check-box findings were based primarily on Plaintiff’s non-
11 credible self-reported symptoms. Tr. 24-25. Pursuant to *Tonapetyan*, 242 F.3d at
12 1149, a physician’s opinion may be disregarded when it is premised on the
13 properly rejected subjective complaints of a plaintiff. Since Plaintiff was properly
14 found by the ALJ to be not entirely credible in this case, *see infra*, the ALJ
15 appropriately accorded little weight to medical findings based predominantly on
16 her subjective complaints. The ALJ did, however, accord weight to the narrative
17 portion of Dr. Arnold’s report, as well as the moderate limitations assessed by Dr.
18 Arnold. These findings are consistent with the weight of the record evidence. Tr.
19 24. The narrative portion of Dr. Arnold’s report and the assessed moderate
20 limitations are incorporated in the ALJ’s RFC determination. Tr. 19.

21 **5. Dr. Mabee, June 2011 Evaluation**

22 In June 2011, Plaintiff was examined by W. Scott Mabee, Ph.D. Tr. 1028-
23 1036. As indicated by the ALJ, Dr. Mabee opined Plaintiff was not actively
24 engaged in testing and her profile was questionable; tests indicated she over-
25 reported her symptoms. Tr. 25, 1032. Nevertheless, Dr. Mabee concluded
26 Plaintiff was able to remember locations and simple repetitive work like
27 procedures; understand, remember and carry out simple verbal and written
28 instructions; concentrate and attend for short periods; make simple work related

1 decisions, request assistance and accept instructions; adhere to basic standards of
2 neatness and cleanliness; and use public transportation. Tr. 25, 1032-1033. The
3 ALJ noted Dr. Mabee reported that although Plaintiff denied abuse of pain
4 medications, the record reflected drug-seeking behavior.¹ Tr. 25.

5 The ALJ accorded “significant weight” to the foregoing narrative portion of
6 Dr. Mabee’s report because the assessed limitations and narrative report as a whole
7 were consistent with the record evidence which demonstrated Plaintiff over-
8 reported her symptoms. Tr. 25. The ALJ’s RFC determination does not conflict
9 with the narrative portion of Dr. Mabee’s report. Tr. 19.

10 The ALJ, however, gave “little weight” to Dr. Mabee’s accompanying
11 activities report. Tr. 25, 1035-1036. Defendant concedes that the ALJ’s
12 conclusion that the check-box portion of Dr. Mabee’s opinion was not
13 accompanied by objective testing was erroneous, as Dr. Mabee submitted the
14 check-box evaluation along with the remainder of his psychological evaluation
15 (which contained objective testing). ECF No. 19 at 9. However, even if the ALJ’s
16 rationale for according little weight to the check-box portion of Dr. Mabee’s report
17 is flawed, this error was “inconsequential to the ultimate non-disability
18 determination” in this case and therefore harmless. *Lewis v. Astrue*, 498 F.3d 909,
19 911 (9th Cir. 2007) (an ALJ’s failure to include an impairment as severe at step
20 two was harmless error where ALJ considered the limitations posed by the
21 impairment at step four); *Johnson v. Shalala*, 60 F.3d 1428, 1436 n.9 (9th Cir.

22
23 ¹Dr. Mabee’s report reflects Plaintiff began using crack cocaine about five
24 years prior to the evaluation and continued for two years; she used marijuana from
25 age 18 until about six months prior to the exam; and Plaintiff has abused her pain
26 medication, went to the hospital many times seeking drugs, was banned from being
27 prescribed narcotic pain medication, and had been found positive for
28 methamphetamine intoxication and use. Tr. 1031.

1 1995) (an error is harmless when the correction of that error would not alter the
2 result). In this case, the ALJ's RFC determination includes the limitations from
3 Dr. Mabee's narrative opinion. Moreover, Dr. Mabee's check-box form
4 assessment, which found no greater than moderate impairment of Plaintiff's ability
5 to do work-related activities, does not conflict with the ALJ's ultimate RFC
6 assessment. Any error the ALJ made in assigning "little weight" to Dr. Mabee's
7 activities form was harmless.

8 **6. Medical Expert Testimony, June 2011**

9 At the June 7, 2011, administrative hearing, Minh Vu, M.D., testified as a
10 medical expert. Tr. 42-47. Dr. Vu indicated none of Plaintiff's physical
11 conditions, alone or in combination, met or equaled any of the listings
12 impairments. Tr. 25, 45. Dr. Vu stated that, giving weight to Plaintiff's pain
13 complaints, he would limit her to light exertion level work with some climbing and
14 postural limitations. Tr. 25, 45.

15 Lloyd Meadow, Ph.D., also testified as a medical expert at the June 2011
16 administrative hearing. Tr. 62-71. Dr. Meadow stated he found the record replete
17 with Plaintiff's pain complaints: she is constantly going to see doctors, is then
18 prescribed and takes medication for the complaints, but she reports no relief. Tr.
19 65. Dr. Meadow discussed that Plaintiff was not taking medication as directed and
20 was continually seeking care for her pain complaints without any objective
21 findings. Tr. 25, 64-66. He testified he did not see in the record any serious post-
22 traumatic stress disorder or anxiety that would preclude simple kinds of work. Tr.
23 66.

24 The ALJ gave weight to the opinions of the medical experts. Tr. 25. The
25 medical expert testimony does not contradict the RFC assessment of the ALJ.

26 **7. Reviewing State Agency Physicians**

27 On June 30, 2009, state agency reviewing physician, James Bailey, Ph.D.,
28 completed a Mental Residual Functional Capacity Assessment form, Tr. 592-595,

1 and a Psychiatric Review Technique form, Tr. 596-609. Dr. Bailey opined
2 Plaintiff was capable of performing non-complex and well-learned detailed tasks.
3 Tr. 26, 594. He indicated that although Plaintiff's concentration, persistence and
4 pace could deteriorate during the day, it would not affect her ability to complete a
5 full workday/workweek, and she would be able to have superficial public and
6 coworker interaction and work toward goals set by others. Tr. 26, 594.

7 On September 16, 2010, state agency reviewing physician, Edward Beaty,
8 Ph.D., reviewed the record and opined no severe impairments existed because
9 mental status examinations did not show severe limitations involving social
10 functioning or concentration, persistence or pace. Tr. 26, 815-827.

11 On September 14, 2010, state agency reviewing physician, Alfred Scottolini,
12 M.D., completed an assessment limiting Plaintiff to light exertion level work. Tr.
13 26, 814. Dr. Scottolini noted Plaintiff's credibility issues and commented that she
14 has "a definite deep seated disability conviction." Tr. 26, 814.

15 These state agency reviewing physicians' reports lend further support for the
16 ALJ's RFC assessment in this case. Tr. 26.

17 As noted above, it is the responsibility of the ALJ to determine credibility,
18 resolve conflicts in medical testimony and resolve ambiguities, *Saelee*, 94 F.3d at
19 522, and this Court may not substitute its own judgment for that of the ALJ, 42
20 U.S.C. § 405(g). Where, as here, the ALJ has made specific findings justifying a
21 decision, and those findings are supported by substantial evidence in the record,
22 this Court's role is not to second-guess that decision. *Fair*, 885 F.2d at 604. Based
23 on the foregoing, the ALJ did not err by rejecting the check-box portion of Dr.
24 Arnold's medical report, which was not consistent with the weight of the record
25 evidence, and any error the ALJ made in discounting Dr. Mabee's activities form
26 was harmless. The Court finds the ALJ's RFC determination is in accord with the
27 weight of the record evidence and free of legal error.

28 ///

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court concludes the ALJ's decision is supported by substantial evidence and free of legal error.

Accordingly, **IT IS ORDERED:**

1. Defendant's Motion for Summary Judgment, **ECF No. 19**, is **GRANTED**.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant and the file shall be **CLOSED**.

DATED June 20, 2014.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE